Supreme Court, U. S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6541

BENNER GLASS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

BENNER GLASS COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of July 18, 1975 and opinion of June 16, 1975, of the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 514 F.2d 641, 77 LC ¶ 10,945 (1975) and is printed in the Appendix at p. 1. The Deci-

sion and Order of the National Labor Relations Board in Case No. 12-CA-6313 is reported at 212 NLRB No. 69, 1974 CCH NLRB ¶ 26,803, and is printed in the Appendix at p. 7. The Board's Decision and Order Directing Hearing and Supplemental Decision and Certification of Representative in Case No. 12-RC-4298 are incorporated and printed in the Appendix at p. 20-27.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 18, 1975. A. 5. A timely Petition for Rehearing was denied on September 23, 1975. A. 6. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1254(1), 2101(c) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. §160(e).

QUESTION PRESENTED FOR REVIEW

Whether a union's pre-election offer to waive initiation fees made one day before the election to all employees eligible to vote negated a free choice between union and no union as guaranteed by Sections 7 and 9(c)(1)(A) of the National Labor Relations Act.

STATUTES INVOLVED

1. Section 7, National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ."

2. Section 9(c)(1)(A), National Labor Relations Act, as amended, 29 U.S.C. §159(c)(1)(A):

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section . . . .
>
> . . . .
>
> ". . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

STATEMENT OF THE CASE

1. Representation Proceedings Before the Board

On February 20, 1973, the Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO (hereinafter referred to as the "Union") filed a petition with the National Labor Relations Board seeking a representation election to be conducted among Benner Glass Company's production and maintenance employees. According to several Company employees, threatening and coercive statements were made by several union adherents during the critical pre-election period. Some employees were told that those who did not join the union would be physically beaten or would be fired. Others were told that those who did not join the union would lose their jobs or not receive any pay raises. On the day preceding the election, the union distributed a written leaflet which stated in part that:

> ". . . Your dues will be $8.00 per month with no initiation fee. No dues will be paid until we have a contract signed by the Company and agreed to by you the workers . . ."

On April 6, 1973, the union won the Board-conducted election by a vote of 26 to 21. There were two challenged and uncounted ballots. Thereafter, the Company timely filed objections to conduct affecting the results of the election. One of the Company's objections was that the union's pre-election offer to waive initiation fees negated the right of free choice in the election. This objection was summarily denied by the Board's Regional Director who reasoned in part that:

> "With respect to the union's representation that the initiation fee would be waived and no dues collected until after a contract was signed, this also is not grounds for setting aside the election, since as a matter of well established Board precedent, such conduct is not deemed to constitute interference with a free choice, absent evidence that these potential benefits were conditioned on the outcome of the election . . ."

The Company then timely filed exceptions to the Regional Director's Recommendations and Report on the Company's objections to the election. Although the Board did grant a hearing with respect to the Company's objection regarding alleged threats and coercive tactics used by union adherents during the critical pre-election period, the Regional Director's recommendation that no evidentiary hearing be granted on the waiver of initiation fee issue was adopted by the Board. In its Decision and Order Directing Hearing, the Board expressly declined to follow the decision of the United States Court of Appeals for the Sixth Circuit in *NRLB v. Savair Manufacturing Co.*, 470 F.2d 305, *aff'd* in 414 U.S. 270 (1973), for the following reasons:

> ". . . the Board adopts the Regional Director's recommendations as to those matters alleged in Objection No. 2 of the Employer. This objection goes to Petitioner's offer of a waiver of initiation fees to all employees eligible to vote in the election. The Regional Director, in recommending that the objection be overruled, relied on *Dit-M-Co, Inc.*, 163 NLRB 1019, *enfd* 428 F.2d 775 (C.A. 8). The Employer, in its exceptions, cites *NLRB v. Savair Manufacturing Co.*, 470 F.2d 305 (C.A. 6), *cert. granted* 935 S.Ct. 2147 (1973) for the proposition that a waiver of initiation fees is coercive.

With due deference to the Court of Appeals for the Sixth Circuit, we shall adhere to our decision in Dit-M-Co until the Supreme Court resolves the issues." (Emphasis added.) Appendix at p. 26, n. 1.

After this Court affirmed the Sixth Circuit's decision in *NLRB v. Savair Manufacturing Co., supra,* and before the Board had issued any final order on the validity of the election, the Company filed a motion for reconsideration of the initiation fee waiver question. On March 7, 1974, the Board issued a supplemental decision and order certifying the union as the bargaining representative. A. 20. In its supplemental decision, the Board noted that the Company had filed a motion for reconsideration based upon the intervening decision by this court in *Savair, supra.* The Board concluded, however, again without conducting any evidentiary hearing, that the Company's motion for reconsideration ". . . raises no substantial or material issue under Board precedent, even as modified by *Savair* . . . ." A. 21, n. 2.

2. Unfair Labor Practice Proceedings Before the Board

Following the union's certification as bargaining representative, the Board's Regional Director issued a complaint and notice of hearing alleging that the Company had violated §§8(a)(1) and (5) of the Act since it had refused to bargain with the union upon request. In its answer to the complaint, the Company admitted its refusal to bargain but claimed it had no duty to bargain because the union had been illegally certified in the prior representation proceeding. As an affirmative defense to the refusal to bargain charge, the Company expressly alleged that the failure to grant an evidentiary hearing in the representation proceedings on the waiver of initiation fee question was a denial of due process of law in

violation of the Fifth Amendment to the United States Constitution and this Court's decision in *NLRB v. Savair Manufacturing Co., supra.* The Board's General Counsel then moved for summary judgment on the refusal to bargain complaint. A notice to show cause order was issued against the Company. In its answer to the show cause order, the Company realleged, *inter alia,* the union's offer to waive its mandatory initiation fee during the critical pre-election period as a defense to the complaint. Once again, without conducting any evidentiary hearing, the Board issued its Decision and Order in Case No. 12-CA-6313, summarily holding that the Company violated §§8(a)(1) and (5) of the Act by refusing to bargain with the union. 212 NLRB No. 69, 1974 CCH NLRB ¶ 26,803. A. 7, 10.

3. Enforcement Proceedings Before the Court of Appeals

On October 1, 1974, the Board filed an application for enforcement[1/] of its order on the refusal to bargain complaint in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals enforced the Board's order and rejected the Company's contention that the union's pre-election offer to waive initiation fees nullified the employees' right to freedom of choice in the election. The Court of Appeals reasoned that it was bound by a prior decision rendered by that Court in *NLRB v. Con-Pac, Inc.,* 509 F.2d 270 (5th Cir. 1975). In *Con-Pac, Inc., supra,* as in the case at bar, the Court of Appeals narrowly construed this Court's previous decision in *Savair* by holding that the decision in *Savair* was not applicable to a union's pre-election offer to waive initiation fees unless such waiver was explicitly granted only to those em-

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1/ See 29 U.S.C. § 160(e).

ployees who signed authorization cards. See 514 F.2d at p. 642; A. 3-4. Although no evidentiary hearing was ever held in the proceedings below on the initiation fee waiver issue, the Court of Appeals concluded that the union's pre-election offer constituted an across-the-board waiver applicable to all employees regardless of whether they has signed authorization cards. *Ibid.*

The Company thereafter filed a timely petition for rehearing with the Court of Appeals. On September 23, 1975, the Company's petition for rehearing was denied by the Court below. A. 6.

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE COURT BELOW CONFLICTS WITH AND UNDERMINES THE NATIONAL LABOR POLICY PREVIOUSLY ESTABLISHED BY THIS COURT IN *NLRB V. SAVAIR MANUFACTURING CO.*, 414 U.S. 270 (1973).

Sections 7 and 9 of the Act were promulgated by Congress to insure that employees voting in Board conducted elections could exercise freedom of choice within a democratic framework. See *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330-331 (1946). Although it is well settled that the Board has discretion to police representation elections, that discretion cannot be utilized to sanction procedures that cast their weight for the choice of the union and against a non-union shop or for a non-union shop and against the union. *NLRB v. Savair, supra.* This Court held in *Savair* that a union's offer to waive initiation fees for those employees signing authorization slips prior to the election illegally permitted the union to buy endorsements and negated the right to free choice in a Board conducted election. While recognizing the Board's discretion to supervise election procedures under the Act, this Court in *Savair* noted that:

> ". . . We do not believe that the statutory policy of fair elections prescribed in the *Tower* case permits endorsements, whether for or against the union, to be bought and sold in this fashion . . ." 414 U.S. at p. 277.

In the case at bar, the Court below was faced with the question of whether a union's pre-election offer to waive initiation fees during the pre-election period negated free choice in the election and precluded a grant of summary judgment on the Board's complaint for an alleged refusal to bargain

with the union. Although no evidentiary hearing was ever conducted in this case, the Court below concluded, as did the Board previously, that a union leaflet passed out on the day before the election constituted an across-the-board waiver of initiation fees to all employees regardless of whether they had signed authorization cards. See 514 F.2d at 642. The union leaflet in question read in part as follows:

> ". . . Your dues will be $8.00 per month with *no* initiation fee. No dues will be paid until we have a contract signed by the company and agreed to by you the workers . . ."

The Court of Appeals distinguished this Court's holding in *Savair* on a critical issue of fact without the benefit of a complete factual record. The unexplained assertion that there will be "no initiation fee" made on the day before the election would hardly warrant the inference that the waiver was made to all employees whether they joined the union before or after the election. Nor was there any evidence that the waiver was made applicable to all employees who joined the union prior to the signing of a collective bargaining agreement with the Company. Therefore, no valid factual determination could have been made by either the Court of Appeals or the Board on the issue of whether or not the union's initiation fee waiver was qualified or unqualified. See *NLRB v. Savair Manufacturing Co., Inc.*, 414 U.S. at p. 274, n. 4; *NLRB v. Gorbea, Perez & Morell*, 328 F.2d 679, 681-82 (1st Cir. 1964).

The employees could logically conclude that the initiation fee waiver was available only during the pre-election period since that was the only time the offer was made. The union's waiver was reasonably calculated to "buy" employee support during the critical pre-election period. This was the very

evil sought to be prevented in *Savair*. Approval of this campaign tactic by the Court below precluded a fair election in which employees could exercise the right to choose between union and no union as guaranteed by Section 7 of the Act and this Court's decision in *Savair*.

II. THE OPINION OF THE COURT BELOW UNDERMINES THE NATIONAL LABOR POLICY OF UNIFORMITY AND WILL GENERATE ENDLESS LITIGATION REGARDING THE PROPRIETY OF PRE-ELECTION INITIATION FEE WAIVERS UNDER THE NATIONAL LABOR RELATIONS ACT.

Since this Court's decision in *Savair, supra*, the Board and several courts of appeals have been faced with pre-election waiver of initiation fee issues similar to the one in the case at bar. Unfortunately, however, the decisions rendered under similar factual patterns lack any relative uniformity. In lieu of stabilizing campaign conduct during Board representation proceedings, the Court below has added to the instability and conflicting decisions which are likely to recur in the future unless this Court finally resolves the matter. For example, the Court below held that the union's waiver of fees was outside the prescriptive ban of *Savair*, even though *Savair* was decided upon the basis of a complete factual record after the conduct of an administrative hearing.[2/] Similar offers to waive initiation fees have been found by other courts of appeals and the Board to be so ambiguous that evidentiary hearings were required or so ambiguous that the union making such offers was penalized for the ambiguity by suffering the consequences of a void election. See, *e.g., NLRB v. Stone &*

2/ See 414 U.S. at 271.

Thomas, 502 F.2d 957 (4th Cir. 1974); *Fort Smith Outerwear, Inc. v. NLRB*, 499 F.2d 223, 226 (8th Cir. 1974); *Inland Shoe Mfg. Co.*, 211 NLRB No. 73, 86 LRRM 1499 (1974); *Coleman Company*, 212 NLRB No. 129, 87 LRRM 1004 (1974); *California State Automobile Association*, 214 NLRB No. 27, 87 LRRM 1305 (1974).3/ *Compare with NLRB v. Wabash Transformer Corp.*, 509 F.2d 647 (8th Cir. 1975), *cert. denied* in ..... U.S. ....., 44 BNA LW 3201 (Oct. 6, 1975); *Altman Camera Co., Inc. v. NLRB*, 511 F.2d 319 (7th Cir. 1975); *NLRB v. S & S Product Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir. 1975); *NLRB v. Con-Pac, Inc.*, 509 F.2d 270 (5th Cir. 1975).

There is no substantive difference between a union's pre-election offer to waive initiation fees which states that ". . . there will be no initiation fee . . ." and a waiver which states ". . . there will be no initiation fee for charter union members . . . ."4/ In either case, the attempt to solicit support through economic inducement comes through loud and clear. The decision of the Court below permits artificial distinctions to be made between substantively identical waivers. This decision will undoubtedly create further confusion for employees and employers subject to the Act and for the Board which has the initial responsibility for prohibiting unfair campaign tactics. In order to provide uniformity and give substantive meaning to permissible and impermissible initiation fee waivers, this Court should grant review of the decision below.

3/ In *Inland Shoe Mfg. Co., supra*, the waiver of initiation fee offer was couched in the following language ". . . there are no initiation fees for charter members of a new local . . ." That language was found to be violative of the pre-election waivers condemned by this Court in *Savair*. In *Coleman Co., supra*, the Board again found a violation of the teachings of *Savair* where the offer to waive initiation fees was made in strikingly similar fashion to the one made in the case at bar. See 87 LRRM at 1005-1006.

4/ See *Inland Shoe Mfg. Co., supra; Coleman Co., supra.*

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH AND UNDERMINES THE NATIONAL LABOR POLICY WHICH GENERALLY PROHIBITS THE CONFERRAL OF ECONOMIC BENEFITS ON EMPLOYEES WHILE REPRESENTATION ELECTIONS ARE PENDING REGARDLESS OF WHETHER SUCH BENEFITS ARE PUT INTO EFFECT CONDITIONALLY OR UNCONDITIONALLY.

In *NLRB v. Exchange Parts Company*, 375 U.S. 405 (1964), this Court held that an employer's grant of new economic benefits during the period immediately preceding a Board conducted election interfered with the employees' right of freedom of choice and was violative of §8(a)(1) of the Act. In holding that the grant of an additional holiday, a new system for computing overtime pay, and a new vacation schedule during the critical pre-election period ran afoul of §8(a)(1) of the Act, this Court reasoned that the Act

> ". . . prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect . . ." 375 U.S. at 409.

In the case at bar, the union's offer to waive initiation fees was an express promise of economic benefit made only prior to the election with no explanation as to whether the benefit was conditional or unconditional. If economic promises or grants of benefits from employers are patently destructive of employees' rights to choose between union and no union under Sections 7 and 9 of the Act, then a union's promise of economic benefits during the same critical pre-election pe-

riod should likewise be banned under the rationale of *NLRB v. Exchange Parts Company, supra.* Although this Court's decision in *Exchange Parts* was cited to the Court below, the Court of Appeals did not come to grips with that case. The teachings of *Exchange Parts* were reaffirmed by this Court in *Savair* and are equally applicable here. The rights of employees who oppose as well as those who favor unions must be protected and respected under the Act. See *NLRB v. Savair,* 414 U.S. at 280-81. The decision of the Court below undermines the *Exchange Parts* labor policy which condemns conduct impinging upon employees' freedom of choice for or against unionization or conduct which is calculated to have such a chilling effect.

CONCLUSION

The decision of the Court below conflicts with and undermines the National Labor policy adopted by Congress and this Court to insure that employees may exercise a free choice between union and no union when participating in Board conducted elections. For these and the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CAVEN & CLARK, P.A.

1101 Blackstone Building
Jacksonville, Florida 32202
Attorneys for Petitioner

By ALLAN P. CLARK

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for A Writ of Certiorari have been furnished to the following by first class United States mail this 31st day of October, 1975:

Robert H. Bork, Solicitor General
Department of Justice
Washington, D.C. 20530

John C. Miller, Esquire
Acting General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Allan P. Clark

Attorney

APPENDIX

1. Opinion of U.S. Court of Appeals dated June 16, 1975

2. Judgment of Court of Appeals dated July 18, 1975

3. Letter from U.S. Court of Appeals dated September 23, 1975

4. NLRB Decision and Order in Case No. 12-CA-6313 dated July 23, 1974

5. NLRB *Supplemental Decision and Certification of Representative* in Case No. 12-RC-4298 dated March 7, 1974

6. NLRB *Decision and Order Directing Hearing* in Case No. 12-RC-4298 dated October 23, 1973.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BENNER GLASS COMPANY, Respondent.

No. 74-3501.

United States Court of Appeals,
Fifth Circuit.

June 16, 1975.

National Labor Relations Board sought to enforce an order requiring employer to cease and desist from unfair labor practices and affirmatively sought to require employer to

bargain with union. The Court of Appeals held that employer, which contended that union had engaged in coercive activity during pre-election period, failed to carry its burden of showing by specific evidence not only that unlawful acts occurred but also that they interfered with employees' exercise of free choice to such an extent that they materially affected results of election, and that leaflet which was distributed by union a day before the election and which stated that there would be no initiation fees and that no dues would be paid until union obtained contract signed by employer and agreed to by members did not void election or union's certification as employees' exclusive bargaining representative.

Enforcement granted.

1. Labor Relations — 555

Employer, which resisted application for enforcement of order of National Labor Relations Board requiring employer to cease and desist from unfair labor practices and to bargain with union on ground that union had engaged in coercive activity during period prior to election of union as bargaining agent, failed to carry its burden of showing by specific evidence not only that unlawful acts occurred but also that they interfered with employees' exercise of free choice to such an extent that they materially affected results of the election.

2. Labor Relations — 211

Union's issuance of leaflets on day prior to union's election as employees' exclusive bargaining representative stating that there would be no initiation fee and that dues would not be paid until union obtained contract signed by employer and

agreed to by members did not void election or certification of the union.

Application for enforcement of an order of the National Labor Relations Board (Florida Case).

Before BELL, DYER and SIMPSON, Circuit Judges.

PER CURIAM:

Benner Glass Company refused to bargain with the Union[1] which had been certified by the Board as the exclusive bargaining representative of the Company's employees. The Board seeks to enforce its order requiring the Company to cease and desist from unfair labor practices, and affirmatively seeks to require the Company to bargain with the Union. The Company resists the Board's application for enforcement, contending that the Union engaged in coercive activity during the critical pre-election period, and further argues that the Union's pre-election offer to waive initiation fees voided the election and the Union's certification. We disagree and enforce.

[1] We encounter no difficulty in concluding that the Company failed to carry its burden of proof to show by specific evidence "not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." N.L.R.B. v. Golden Age Beverage Co., 5 Cir. 1969, 415 F.2d 26, 30.

[2] The Company, relying on N.L.R.B. v. Savair Manu-

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1. Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO.

facturing Co., 1973, 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495, urges that it had no duty to bargain because the Union's pre-election offer to waive initiation fees nullified the employees' free choice in the election. The Union leaflet, issued the day before the election, stated, *inter alia*, that "dues would be $8.00 per month with no initiation fee. No dues will be paid until we have a contract signed by the Company and agreed by you, the members."

The Company's argument is foreclosed by our recent decision in N.L.R.B. v. Con-Pac, Inc., 5 Cir. 1975, 509 F.2d 270, in which Judge Ainsworth, as the Court's organ, speaking to this precise point said:

> In N.L.R.B. v. Savair Mfg. Co., 414 U.S. 270, 94 S.Ct. 495, 38 L.Ed.2d 495 (1973), the Supreme Court held that union waiver of initiation fees in return for employees' signatures on authorization cards violated the conditions of employee free choice that must be preserved for an N.L.R.B. certification election to be valid. Here, however, the Union simply stated that there would be no initiation fees at all, regardless of whether an employee signed an authorization card, and that there would be no dues until the employees had ratified a union contract. Because of this essential difference the conclusion reached in *Savair* is inappropriate here.

Id. at 272.

Enforcement granted.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-3501

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BENNER GLASS COMPANY,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board

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Before BELL, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Benner Glass Co., its officers, agents, successors and assigns on July 23, 1974. The Court heard argument of respective counsel and has considered the briefs and transcript of record filed in this cause. On June 16, 1975, the Court delivered its opinion granting enforcement of the Board's order. In conformity therewith it is hereby

ORDERED and ADJUDGED that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, Benner Glass Co., its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: July 18, 1975

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
September 23, 1975

TO ALL COUNSEL OF RECORD

No. 74-3501 – National Labor Relations Board vs. Benner Glass Company

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
by /s/ CLARE F. SACHS
Deputy Clerk

cc: Mr. Elliott Moore
Mr. David S. Fishback
Mr. Allan P. Clark

MFP
D--8947
Jacksonville, Fla.

212 NLRB No. 69

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BENNER GLASS CO.
and Case 12--CA--6313
ALLIED SERVICES DIVISION,
BROTHERHOOD OF RAILWAY, AIRLINE
AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION
EMPLOYEES, AFL--CIO

DECISION AND ORDER

Upon a charge filed on March 21, 1974, by Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL--CIO, herein called the Union, and duly served on Benner Glass Co., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint on April 4, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 7, 1974, following a Board

election in Case 12--RC--4298 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1/] and that, commencing on or about March 19, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 12, 1974, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 22, 1974, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Previously, on April 17, 1974, the Charging Party had filed a Motion for Summary Judgment.[2/] Subsequently, on May 6, 1974, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

1/ Official notice is taken of the record in the representation proceeding, Case 12--RC--4298, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151, enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

2/ In view of our determination herein, it is unnecessary to rule on the Union's Motion for Summary Judgment.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, the Respondent admits the factual allegations of the complaint, but denies the validity of the certification of the Union in the underlying representation case on the grounds that the Board erred in its rulings on its objections to the election, and by not granting it an evidentiary hearing on one of its objections.

Review of the record herein, including the record in Case 12--RC--4298, indicates an election was conducted pursuant to a Stipulation for Certification Upon Consent Election on April 6, 1973, which resulted in a 26-to-21 vote in favor of the Union, with 2 challenged ballots. Respondent filed timely objections to conduct affecting the results of the election, alleging in substance that the Union had engaged in threatening and coercive conduct which destroyed the laboratory conditions for the election, and had coercively offered to waive initiation fees.

After an administrative investigation, the Regional Director issued his Report and Recommendations on Objections on July 20, 1973, in which he found no concrete evidence of the coercive and threatening conduct by the Union, and upheld the propriety of the Union's waiver of initiation fees. Respondent filed timely exceptions to this report, asserting that factual questions had been raised which required a hearing. The Board, on October 23, 1973, issued a Decision and Order directing a Hearing in which it adopted the Regional Director's recommendation regarding the propriety of the waiver of initiation fees, and ordered a hearing on the alleged threats

and coercive conduct by the Union. Pursuant to this Order, a hearing was held on November 8 and 12, 1973, at which all parties were present and were given the opportunity to present evidence. The Hearing Officer, in his report of December 21, 1973, found that the objection was insufficient to raise material or substantial issues affecting the results of the election, and recommended that it be overruled.

In the interim, Respondent filed a motion for reconsideration of the Board's Decision and Order in light of the decision of the U.S. Supreme Court in *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). Following the issuance of the Hearing Officer's report, the Board, on March 7, 1974, issued a Supplemental Decision and Certification of Representative, adopting the Hearing Officer's findings, conclusions, and recommendations, denying the Respondent's motion for reconsideration as not raising substantial or material issues under Board precedent even as modified by *Savair*,[3/] and certifying the Union.

It thus appears that Respondent is again attempting to raise in this proceeding issues litigated at length in the underlying representation case, resolved adversely to Respondent by the Board after a hearing.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4/]

3/ See *Con-Pac, Inc.*, 210 NLRB No. 70; *Irwindale Division, Lau Industries, a Division of Phillips Industries, Inc.*, 210 NLRB No. 42.

4/ See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Florida corporation with its principal office and place of business in Jacksonville, Florida, where it is engaged in the operation of a glass products factory. Respondent annually receives goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Florida. Respondent annually sells and ships products valued in excess of $50,000 directly to customers located outside the State of Florida.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Allied Services Division, Brotherhood of Railway, Airline

and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Respondent at its factory located at 5329 Powers Avenue, Jacksonville, Florida; excluding all clerical employees, guards, professional employees, and supervisors as defined in the Act.

2. The certification

On April 6, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 12, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on March 7, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about March 14, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described

unit. Commencing on or about March 19, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since March 19, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe

the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Benner Glass Co. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Respondent at its factory located at 5329 Powers Avenue, Jacksonville, Florida; excluding all clerical employees, guards, professional employees, and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 7, 1974, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about March 19, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Benner Glass Co., Jacksonville, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment, with Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees employed by the Respondent at its factory located at 5329 Powers

Avenue, Jacksonville, Florida; excluding all clerical employees, guards, professional employees, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its factory at 5329 Powers Avenue, Jacksonville, Florida, copies of the attached notice marked "Appendix."[5/] Copies of said notice, on forms provided by the Regional Director for Region 12 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

5/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. JUL 23 1974

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Edward B. Miller, Chairman

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John H. Fanning, Member

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John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees employed by the Employer at its factory located at 5329 Powers Avenue, Jacksonville, Florida; excluding all clerical employees, guards, professional employees, and supervisors as defined in the Act.

BENNER GLASS CO.

.....
(Employer)

Dated .....

By .....
(Representative) Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Room 706, Federal Office Building, 500 Zack Street, P.O. Box 3322, Tampa, Florida 33602, Telephone 813--228--2641.

MFP
Jacksonville, Fla.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-RC-4298

BENNER GLASS CO.

Employer

and

ALLIED SERVICES DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO,

Petitioner

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

On October 23, 1973, the Board issued its Decision and Order Directing Hearing in this matter, following consideration of the Employer's exceptions to the Regional Director's Report recommending that the Employer's objections to conduct affecting the results of the election be overruled in their entirety and Petitioner be certified as the exclusive collective-bargaining representative in the stipulated unit in which the election was held.1/ The Board adopted the Regional Director's recommendation that the Employer's Objection No. 2

1/ The tally of ballots showed that 26 ballots were cast for Petitioner and 21 against it, with 2 challenged ballots that were indeterminative.

be overruled2/ but ordered that a hearing be held before a Hearing Officer for the purpose of receiving evidence to resolve the issues raised with respect to Employer's Objection 1 concerning alleged threats, bodily injury, and the existence of an atmosphere of fear and coercion.

Pursuant to the Board's Order, a hearing was held on November 8 and 12, 1973, before Hearing Officer J. Howard Trimble. All parties participated and were given full opportunity to examine and cross-examine witnesses and to introduce evidence bearing on the issues. On December 21, 1973, the Hearing Officer issued and duly served on the parties his Report and Recommendations on Objection to the Election, in which he recommended that Employer's Objection 1 be overruled and that a Certification of Representative be issued. Thereafter the Employer filed timely exceptions to the Hearing Officer's Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

2/ In that objection, the Employer had contended that a leaflet distributed by the Petitioner on the eve of the election to all employees was coercive because it included the statement "Your dues will be $8.00 per month with *no* initiation fee." (Original emphasis.)

The Employer filed a Motion for Reconsideration of its Objection No. 2 subsequent to the Supreme Court's decision in *N.L.R.B. v. Savair Manufacturing Company*, U.S. (1973). This motion raises no substantial or material issue under Board precedent, even as modified by *Savair*. Accordingly, the Employer's Motion for Reconsideration is hereby denied.

The Board has considered the Hearing Officer's Report, the Employer's exceptions, and the entire record in this case, and hereby adopts the Hearing Officer's findings, conclusions, and recommendations.3/

As we have overruled the Employer's objections and the tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, we shall certify it as the exclusive bargaining representative of the employees in the unit found appropriate.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid ballots has been cast for Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the unit found appropriate herein for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

Dated, Washington, D. C., March 7, 1974

3/ The Employer excepted to the Hearing Officer's failure to consider the cumulative effect of the incidents alleged in Objection No. 1. In our view, whether considered individually or together, these incidents did not create an atmosphere of confusion or fear which would warrant the conduct of a new election.

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Edward B. Miller, Chairman

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John H. Fanning, Member

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John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Jacksonville, Fla.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-RC-4298

BENNER GLASS CO.
Employer

and

ALLIED SERVICES DIVISION, BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO,
Petitioner

DECISION AND ORDER DIRECTING HEARING

Pursuant to a Stipulation for Certification Upon Consent Election, a secret ballot election was conducted among the employees in the stipulated unit described below. The tally of ballots furnished the parties showed that of approximately 50 eligible voters, 49 cast ballots, of which 26 were for, and 21 against, the Petitioner. There were 2 challenged ballots which were insufficient to affect the results. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

Pursuant to the Board's Rules and Regulations the Regional Director investigated the objections and thereafter on July 20, 1973, issued and served on the parties his Report and Recommendations on Objections. In his report, the Regional Director recommended that the objections be overruled in their entirety and Petitioner be certified as the exclusive collective-

bargaining representative in the stipulated unit. Thereafter, the Employer filed timely exceptions to the Regional Director's Report and a supporting brief contending that the election should be set aside and a rerun election ordered, or in the alternative, that the case be remanded to the Regional Director for a hearing on the objections.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated and we find that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its factory located at 5329 Powers Avenue, Jacksonville, Florida; excluding all clerical employees, guards, professional employees and supervisors as defined in the Act.

5. The Board has duly considered the Employer's Objections, the Regional Director's Report and the Employer's exceptions, and is of the opinion that issues have been raised with respect to Objection No. 1 concerning alleged threats, bodily injury and the existence of an atmosphere of fear and coercion which may best be resolved by a hearing.1/

ORDER

IT IS HEREBY ORDERED that a hearing be held before a Hearing Officer to be designated by the Regional Director for Region 12 for the purpose of receiving evidence to resolve the issues raised by Employer's Objection No. 1.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objection. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party, and shall file a copy with the Regional Director. If no ex-

1/ The Board adopts the Regional Director's recommendations as to those matters alleged in Objection No. 2 of the Employer. This objection goes to Petitioner's offer of a waiver of initiation fees to all employees eligible to vote in the election. The Regional Director, in recommending that the objection be overruled, relied on *DIT-MCO Incorporated*, 163 NLRB 1019, enfd. 428 F.2d 775 (C.A. 8). The Employer, in its exceptions, cites *N.L.R.B.* v. *Savair Manufacturing Company*, 470 F.2d 305 (C.A. 6), cert. granted 935 S. Ct. 2147 (1973) for the proposition that a waiver of initiation fees is coercive. With due deference to the Court of Appeals for the Sixth Circuit, we shall adhere to our decision in *DIT-MCO* until the Supreme Court resolves the issues.

ceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 12 for the purpose of conducting such hearing, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

Dated, Washington, D.C., October 23, 1973.

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Edward B. Miller, Chairman

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John H. Fanning, Member

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John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)